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Nos. 87-1622, 87-1697, and 87-1711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,
v.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS, COUNTY OF YAKIMA, *et al.*

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QUESTION PRESENTED

Whether either congressional delegation or "inherent sovereign power" authorizes tribal zoning jurisdiction over non-Indians on fee land.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments.

These related cases concern the authority of state and local governments to regulate the use of land held in fee simple by non-Indians within the territory of an Indian reservation.[1] It is estimated that 350,000 non-Indians live on reservations.[2] Thirty-three States have one or more Indian reservations within their boundaries[3]; at least 379 counties have Indian reservations on which land is individually owned.[4] These state and local governments have innumerable land use regulations, including zoning, which are routinely applied to reservation land owned by non-Indians. Thus, the Ninth Circuit's decision that the Yakima Nation has jurisdiction to regulate in this case is of profound concern to *amici*.

As a result of federal policy in the 1800s, much reservation land is not actually owned by tribes or tribal members, but is owned by non-Indians. On the Yakima reservation, for example, non-Indians outnumber Indians four to one.

The checkerboard pattern of tribal and nontribal land ownership presents a difficult problem for state and local governments, as well as for the tribes, not only in regulating land use but in such areas as taxation and business and environmental regulation as well. Although a tribe clearly has an interest in controlling its own affairs, that interest must be reconciled with the interests of the state and local governments that provide many of the services needed by all citizens, Indian and non-Indian alike, who reside on the reservation. Such services cost money and are frequently provided most efficiently by state or local government. To serve their citizens, state and local governments must have the necessary authority to guide rural development by effective regulation.

[1] Throughout this brief we use the word non-Indians to include Indians who live on the reservation of a tribe of which they are not members.

[2] Brief of the State of Washington, *et al.*, as *amici curiae* in support of the petitions for writs of certiorari in these cases, at 2.

[3] *Ibid.*

[4] National Association of Counties, *Counties with Indian Reservations or Trust Lands* (May 11, 1983).

The right of Indian tribes to make their own laws and "be ruled by them" is limited by the rights of non-Indians to be free of regulation by a government in which, because of race, they cannot participate or vote. In general, the inherent sovereign powers of an Indian tribe do not extend to the activities or property of non-Indians. *Montana v. United States*, 450 U.S. 544, 564 (1981). A rule giving civil jurisdiction to the tribe effectively disenfranchises non-Indians with regard to actions that significantly affect their livelihood and property.

Amici submit that the decision of the Ninth Circuit with respect to the Wilkinson property, styled *Whiteside II* by the court of appeals (Nos. 87-1697 and 87-1711), is wrong.[5] Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[6]

[5] *Amici* take no position with respect to that portion of the Ninth Circuit's decision that deals with the Brendale property, styled *Whiteside I* by the court of appeals (No. 87-1622). The County of Yakima did not appeal from the district court's decision denying county zoning in the closed area of the Reservation and does not directly challenge in this Court the Ninth Circuit's affirmance of that decision.

[6] The parties' letters of consent, pursuant to Rule 36 of the Rules of this Court, have been filed with the Clerk.

STATEMENT

These consolidated cases concern the limits of tribal authority over non-Indians. Specifically, they raise the question of the authority of tribal government to regulate the use of land owned in fee by non-Indians. Resolution of that question requires consideration of the interests of two sovereigns under the federal system: Yakima County, on the one hand, and the Yakima Indian Nation, on the other.

Background

Respondent Yakima Nation is a confederation of fourteen distinct Indian tribes that banded together in the Nineteenth Century to negotiate a treaty with the United States. Pet. App. 36a.[7] Under the 1855 Treaty with the Yakimas, the Yakima Reservation was established for the exclusive use and benefit of the Yakima Nation. *Id.* at 37a. The Reservation encompasses 1.3 million acres, of which eighty percent is held in trust by the United States for the benefit of the tribe or its individual members. *Ibid.* The remaining twenty percent was divested under the General Allotment Act of 1887, 25 U.S.C. §§ 331-358, and is held in fee simple by both Indians and non-Indians. Pet. App. 37a.

In 1954, the Yakima Nation, through a Tribal Resolution, divided the Reservation into two areas, the so-called closed and open areas. Pet. App. 114a. Most of the trust land lies within the closed area, which occupies the western two-thirds of the Reservation. *Id.* at 38a. Of the 807,000 acres of the closed area, 740,000 acres are in Yakima County. *Ibid.* About 25,000 acres of the closed areas are owned in fee. *Ibid.* The closed area is restricted to members of the Yakima Nation, its employees, and permittees, in order to protect the area's natural resources, natural foods, medicines, wildlife, and environment. *Id.* at 114a-116a. Ninety percent of the Yakima

[7] References are to the appendix to the petition for a writ of certiorari in *Wilkinson v. Confederated Tribes*, No. 87-1697.

Nation's income is derived from the closed area. *Id.* at 136a. There are no permanent residents in the part of the closed area located in Yakima County. *Id.* at 39a.

Yakima County, under a comprehensive zoning ordinance adopted in 1972, has zoned the fee lands in the closed area as "forest watershed." Pet. App. 121a. The stated purpose of the forest-watershed district is "to facilitate land and water conservation while accommodating residential, recreational and commercial uses." *Ibid.* Within the district, diverse uses are permitted, including single-family dwellings, campgrounds, small overnight lodging facilities, restaurants and bars, certain stores, service stations, marinas, sawmills, and dams for the production of electricity. *Ibid.* The County does not apply its zoning laws to trust lands. *Ibid.*

The Yakima Nation adopted a zoning ordinance in the same year as the County. Under that ordinance, which was an expanded version of one modeled on the County's comprehensive ordinance, the closed area is classified as a "special use district," in which only the following uses are allowed:

1. Harvesting wild crops;
2. Grazing, timber production, or open field crops;
3. Hunting or fishing by tribal members;
4. Camping in temporary structures;
5. Tribal camps for the education and recreation of tribal members; and
6. Construction and occupancy of buildings and structures constructed by the Yakima Nation or the Bureau of Indian Affairs to be used in the furtherance of tribal resources.

Pet. App. 119a. No other building or permanent structure or any appurtenances thereto are allowed. *Id.* at 120a.[8]

[8] The ordinance also provides that any authorized structure shall be set back 200 feet from any waterway. Pet. App. 120a.

In "sharp contrast" to the closed area is the open area of the Reservation. Pet. App. 40a. The open area consists of approximately 350,000 acres, to which non-Indians have unlimited access. *Id.* at 83a. Almost half of the open area is owned in fee. *Id.* at 40a. Only 5,000 Indians live in the open area; 20,000 non-Indians live there. *Id.* at 84a. Three incorporated towns—Toppenish, Wapato, and Harrah—are located in the open area. *Id.* at 51a. Most of the open area consists of rangeland and land used for agriculture, commercial purposes, and residential development. *Id.* at 39a-40a.

While Yakima County provides no services in the closed area, it provides all traditional county services in the open area, including police and fire protection and water and sewer service. The County has built and maintains about 500 miles of roads. Pet. App. 52a. It provides schools for Indians and non-Indians alike. *Id.* at 88a.

Proceedings Below

Petitioner in No. 87-1697 (*Whiteside II*), Stanley Wilkinson, owns in fee a forty-acre tract of land in the open area of the Reservation, three miles from the City of Yakima. Pet. App. 47a. Under the Yakima Nation zoning ordinance, his property is designated as "agricultural," which indicates that the "principal use of the land is for agricultural purposes." *Id.* at 42a. Under this classification, all buildings are prohibited except agricultural buildings, buildings on public parks and playgrounds, and single-family dwellings. *Ibid.* The minimum lot size is five acres. *Ibid.*

Under the Yakima County zoning ordinance, however, the Wilkinson property is classified as "general rural," one of three districts that replaced a prior agricultural classification. The general rural district "is intended to 'provide protection for the county's unique resources and land base;' 'minimize scattered rural developments . . . by encouraging clustered development;' and 'permit only

those uses which are compatible with [the] rural character.'" Pet. App. 45a; see also *id.* at 52a. Nevertheless, the general rural district, particularly with a special use permit, allows a substantially broader range of uses than is allowed under the Yakima Nation's agricultural classification. *Id.* at 44a-45a. The minimum residential lot size under the County's general rural classification is as small as one-half acre, although the average size of lots in a subdivision must be at least one acre. *Id.* at 46a.

In 1983, Wilkinson sought permission from the Yakima County Planning Department to subdivide thirty-two acres into twenty lots, ranging in size from 1.1 to 4.5 acres, to be used for single-family dwellings. Pet. App. 48a. Wilkinson filed an environmental checklist to allow the Planning Department to determine whether an environmental impact statement was required. *Id.* at 48a-49a. Ultimately, after Wilkinson agreed to modify his proposal, the Department issued a declaration of non-significance. *Id.* at 49a. The Yakima Nation appealed to the County Board of Commissioners, and the Board affirmed. *Id.* at 50a.

The Yakima Nation then filed suit to challenge this decision in the District Court for the Eastern District of Washington. As summarized by the district court, the complaint sought a declaration that the Yakima Nation had "exclusive and paramount" jurisdiction over land use in the open area of the Reservation and an injunction against the County's assertion of jurisdiction. Pet. App. 34a-35a. The district court held that the Yakima Nation had no jurisdiction to zone Wilkinson's property. *Yakima Indian Nation v. Whiteside (Whiteside II)*, Pet. App. 33a-79a. The holding was based on the district court's extensive findings of fact in conformance with standards set forth in this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). See Pet. App. 65a. Specifically, the court concluded that "Wilkinson's

proposed development does not pose a threat to the 'political integrity', the 'economic security' or the 'health and welfare' of the Yakima Nation." *Id.* at 67a; see also *id.* at 53a-55a. The court also found that "the Yakima County zoning scheme is more protective of the Open Area's agricultural lands than the Yakima Nation's 'agricultural' use district." *Id.* at 53a.

Petitioner in No. 87-1622 (*Whiteside I*), Philip Brendale, owns in fee 160 acres of land in the forested portion of the closed area. Pet. App. 123a. In 1982, Brendale filed four contiguous short plat applications with the Yakima County Planning Department, which issued a declaration of non-significance and approved the applications. *Id.* at 124a. In 1983, Brendale submitted a long plat application to divide one of his newly platted twenty-acre parcels into ten two-acre lots, for use as summer cabin sites. *Id.* at 125a. The County Planning Department issued another declaration of non-significance. *Id.* at 125a-126a. Yakima Nation appealed to the County Board of Commissioners, which held that the County had jurisdiction over the zoning of fee land, but agreed that an environmental impact statement was required. *Id.* at 126a-127a.

As in *Whiteside II*, the Yakima Nation challenged the County's assertion of jurisdiction in federal court, seeking the same relief on the same grounds. Pet. App. 109a-110a. In the Brendale case, in contrast to the Wilkinson case, the district court held that the Yakima Nation had exclusive jurisdiction over lands held in fee by non-Indians in the closed area of the Yakima Reservation. *Yakima Indian Nation v. Whiteside (Whiteside I)*, Pet. App. 108a-171a. The district court determined that the Brendale development "pose[d] a threat to the political integrity, the economic security and the health and welfare of the Yakima Nation." Pet. App. 144a. Although the proposal endangered significant economic interests, the threat to the cultural and spiritual values of the

closed area was of paramount concern. *Id.* at 144a-145a. Under *Montana*, the court held, these findings required a ruling for the Yakima Nation. *Id.* at 142a-145a.

Whiteside I and *II* were consolidated on appeal to the Ninth Circuit. The court of appeals held that the Yakima Nation has the authority to regulate land use by non-Indians on the entire Reservation, closed and open areas alike. Citing *Montana*, the court found that zoning "traditionally has been considered an appropriate exercise of the police power of a local government, precisely because it is designed to promote the health and welfare of its citizens." Pet. App. 21a-22a.

After concluding that the Yakima Nation had the authority to zone land within the Reservation, the court conducted a balancing test to determine whether the tribe's interests outweighed the County's interests in zoning within the Reservation. With respect to the Brendale property located within the closed area (*Whiteside I*), the Ninth Circuit agreed with the district court that the County's application of the zoning classification to the closed area threatened significant tribal interests in "maintaining the character of the closed area." Pet. App. 27a. With respect to the Wilkinson property located within the open area (*Whiteside II*), however, the court remanded the case to the district court for an identification and balancing of tribal and county interests in zoning the land. Pet. App. 31a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Indian authority over non-Indians derives solely from congressional delegation or inherent sovereign power. Neither source of authority provides a general ground for tribal authority to impose land use regulation on land owned in fee by non-Indians.

Congress has not authorized Indians to impose land use regulation on non-Indian fee land. Indeed, relevant fed-

eral statutes evince an intent to divest Indians of any jurisdiction over fee lands. The General Allotment Act of 1887, for example, was intended to divest the tribes of both their lands and jurisdiction over the lands by granting individual Indians fee simple title to parcels on the reservations.

Similarly, it is common ground that tribal sovereign authority is limited in nature. Indian tribes have a "diminished status as sovereigns" and "have lost any 'right of governing every person within their limits except themselves.'" *Montana v. United States*, 450 U.S. 544, 565 (1981), *quoting Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring). Thus, as a general rule, the inherent sovereign power of Indians does not extend to non-Indians at all. Indian tribunals have no jurisdiction over non-Indians in criminal matters. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

In civil cases, inherent Indian jurisdiction is narrowly limited to that necessary "to protect tribal self-government or to control internal relations." *Montana*, 450 U.S. at 564. The undisturbed findings of the district court disclose that the County's zoning ordinance applicable to land in the open area of the Reservation poses no threat to the political integrity, economic security, or health or welfare of the Yakima Nation. Under *Montana*, the court of appeals erred in concluding that Indian jurisdiction existed.

In this case, Indian jurisdiction is particularly problematic because non-Indians are excluded by virtue of their race from participating in tribal government. The tribe's exercise of zoning authority over non-Indians thus would threaten the citizen's fundamental right to have a voice in the government by which he is regulated. It does so, moreover, on the undeniably invidious basis of race. These lurking constitutional defects require a narrow construction of the tribe's authority, that is, a holding that

it does not include the authority to zone land held in fee by non-Indians.

Finally, the Ninth Circuit, while recognizing that effective land use regulation requires comprehensive planning, completely overlooked the practical consequences of its decision on the County's zoning authority. Zoning is not the kind of regulation that allows sharing authority on a case-by-case basis. Permitting the Yakima Nation to prescribe zoning for the non-Indian fee lands in this case creates the possibility of conflicting regulation, which could disrupt the County's comprehensive zoning plan not only for those lands, but for county lands outside the Reservation.

ARGUMENT

I. INDIAN ZONING AUTHORITY DOES NOT EXTEND TO NON-INDIANS ON FEE LAND.

A. Authority To Zone Non-Indian Lands Must Derive From Congressional Mandate Or "Inherent Authority."

"The sovereignty that the Indian tribes retain is of a unique and limited character." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). "It exists only at the sufferance of Congress and is subject to complete defeasance." *Id.* at 323; *Rice v. Rehner*, 463 U.S. 713, 719 (1983). The limitations on Indian sovereignty "rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." *Wheeler*, 435 U.S. at 326.

In particular, "[e]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. 544, 564 (1981); *see also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Williams v. Lee*, 358 U.S. 217,

220 (1959). For this reason, the authority of a tribe to regulate the conduct of non-Indians must derive either from congressional delegation or from the "inherent sovereign powers" of the tribe. *Montana*, 450 U.S. at 565.

Thus, in order for the Yakima Nation to prevail in this case on its claim of authority to regulate fee lands owned by non-Indians, it must show either that such authority has been delegated by Congress or that it is an inherent power essential to the protection of tribal self-government. Neither source of power exists in this case.

1. *Congress has not authorized Indian zoning of non-Indian fee lands.*

No federal statute authorizes tribes to regulate the use of fee lands held by non-Indians. No statute even hints at that authority. To the contrary, the only federal statutes that bear on the issue presented here suggest that Congress has divested Indians of authority over fee lands.

The General Allotment Act of 1887, 25 U.S.C. §§ 331-358, authorized the President to allot Indian trust lands to individual Indians in fee. The fee lands at issue in this case were originally allotted pursuant to this Act to members of the Yakima Nation and ultimately passed to non-Indians. As this Court explained in detail in *Montana*, Congress foresaw that allotted lands might eventually be owned by non-Indians and intended the cessation of tribal jurisdiction over those lands. "There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with dissolution of tribal . . . jurisdiction." 450 U.S. at 559 n. 9. The Court went on to say: "It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Ibid.*

As the Court noted in *Montana*, 450 U.S. at 559 n.9, Congress repudiated the Allotment Act's policy of allotment and sale of surplus reservation land when it enacted the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.* That repudiation, however, did not itself alter "the effect of the land alienation occasioned by that policy." *Montana*, 450 U.S. at 559 n.9.

In fact, the legislative history of the Reorganization Act confirms that Congress did not intend to confer on the tribes jurisdiction over non-Indian owners of fee land. The original version of the bill included a section establishing federal municipal corporations on the reservation that would have all of the functions customarily exercised by local government. H.R. 7902, 73d Cong., 2d Sess. §§ 2, 4a (1934), and S. 2755, 73d Cong., 2d Sess. §§ 2, 4a (1934). That government presumably would have had jurisdiction over non-Indian landowners on reservations. Before the bill passed, however, the proposal for federal municipal corporations was dropped; and the Committee on Indian Affairs "eliminated . . . from the bill as originally presented the right of the Indians to make laws upon the reservations." 78 Cong. Rec. 11,123 (1934) (statement of Sen. Wheeler). *See generally New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 326 (1983).

Although the federal government's policy regarding allotment of land to the Indians has changed over the years, the General Allotment Act has never been repealed, and it remains the clearest indication of congressional policy toward lands owned in fee on a reservation: Indian jurisdiction has been divested.[9]

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[9] The Ninth Circuit concluded that the Treaty with the Yakimas, 12 Stat. 951 (1855), explicitly authorizes the Nation to regulate non-Indian fee land because the "United States agreed

In sum, Congress has not only failed to authorize Indian jurisdiction over fee lands, it has expressed a clear intent to divest Indians of that jurisdiction. The policies underlying the Allotment Act were clearly aimed at divesting tribal sovereign authority over non-Indians on fee land. Congressional intent is further evidenced by Congress's failure to close the open areas of reservations, authorize condemnation of lands owned in fee for transfer to tribal governments, or otherwise indicate its disapproval of the assumption of jurisdiction by state and local governments.[10] Even the Indian Reorganization Act

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that the Yakima Nation reserved to itself and was guaranteed a right to its 'own government' and its 'own laws.'" Pet. App. 17a. This conclusion, however, begs the question whether the Yakima Nation's "own government" and "own laws" extend to fee land owned by non-Indians.

The provision of the Treaty reserving land "for the exclusive use and benefit" of the Yakima Nation is similarly inapposite to this case. The reservation of lands through the Treaty was substantially modified by the General Allotment Act of 1887, through which tribal lands were allotted in fee. *See Montana*, 450 U.S. at 559. As the Court observed in *Montana*, "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." 450 U.S. at 561, *citing Puyallup Tribe, Inc. v. Washington Game Dep't*, 433 U.S. 165, 174 (1977). Thus, the original status of all lands within the Yakima Reservation as trust lands has no bearing on the authority that the tribe now has over lands freely alienated under the Allotment Act.

[10] Yakima County has regulated land use since 1946; it enacted a comprehensive zoning ordinance in 1965. Pet. App. 5a. The County has repeatedly exercised authority over deeded land on the Reservation, processing 148 short plats and 14 long plats, including one for the Tribe itself (Transcript of Proceedings in *Whiteside II* (Tr.) 455); issuing 780 building permits; and processing 44 special use permit files, 19 variances, and 11 rezoning applications. Tr. 498, 538.

Yakima County also has, in addition to its comprehensive zoning regulations, other land use regulations applicable to fee land. It imposes standards for streets, water, sewage, drainage, parks and recreation areas, and school sites. Pet. App. 46a. As man-

of 1934, although it encouraged tribal self-determination and repudiated the assimilationist policies underlying the Allotment Act, contained no legal grant of tribal jurisdiction over lands held in fee by non-Indians. Thus, neither the language nor the legislative history of relevant federal legislation supports tribal jurisdiction over lands held in fee by non-Indians.

2. *Indian "inherent sovereign powers" do not generally extend to non-Indians on fee lands.*

The "inherent sovereign powers" of Indian tribes over the conduct of non-Indians are extraordinarily limited. In the criminal area, they have no inherent power over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978). Absent congressional authorization or treaty provision, a tribal court may not exercise criminal jurisdiction over nonmembers. *Id.* at 195, 210.

Although *Oliphant* determined only that inherent tribal authority was lacking in criminal matters, the "principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to activities of nonmembers of the tribe." *Montana*, 435 U.S. at 565. Thus, in *Montana*, this Court held that the Crow Indian Tribe had no power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. Relying on its decision in *United States v. Wheeler*, 435 U.S. at 323, the Court held that "through their original incorporation into the United States as well as through specific treaties and

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dated by state law, the County regulates certain activities adjacent to the shorelines (*ibid.*), and reviews the potential impact of all non-exempt land use actions. *Id.* at 46a-47a. It attempts to control development on flood plains as a condition of participating in the federal flood insurance program. *Id.* at 46a.

As noted (page 2, *supra*), Indian reservations are found within thirty-three States, and land is individually owned on reservations in at least 379 counties.

statutes, the Indian tribes have lost many of the attributes of sovereignty." *Montana*, 450 U.S. at 563. The areas in which implicit divestiture of sovereignty has occurred "'are those involving the relations between an Indian tribe and nonmembers of the tribe.'" *Id.* at 564, *quoting Wheeler*, 435 U.S. at 326 (emphasis deleted).

The Court found that "regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations." 450 U.S. at 564. Thus, such regulation could not be sustained by "general principles of retained inherent sovereignty." *Id.* at 565. Inherent Indian authority governs only those who "enter consensual relationships with the tribe or its members" or whose "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.[11]

The Ninth Circuit, in holding that both the closed and open areas were subject to Indian zoning authority, misapplied the *Montana* standard. The court held that the County's zoning authority would threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. In reaching its conclusion, however, the Ninth Circuit misread *Montana* and radically expanded the concept of inherent Indian sovereignty. It ignored, moreover, the factual findings of the district court.

The language of the *Montana* opinion carefully limits Indian jurisdiction over non-Indians to that "necessary

[11] No argument can be made in this case that tribal zoning authority extends to non-Indians on fee land under the exception pertaining to consensual relationships. Non-Indians often acquire land directly from other fee owners or through inheritance without entering into any relationship with the tribe. *Montana*, which itself involved fee land, demonstrates that the acquisition of fee lands is not a sufficient basis on which to invoke the consensual relationship exception.

to protect tribal self-government." 450 U.S. at 564. To justify tribal regulation, the conduct of non-Indians must "imperil" the welfare of the tribe (*id.* at 566) or "threaten [its] political or economic security" (*ibid.*). This parsimonious language clearly belies the notion that inherent power includes the exercise of traditional police power over non-Indians residing on fee land in the open area.

Moreover, the *Montana* decision itself shows that the Court did not equate inherent authority with traditional police powers. Comparable police powers—the regulation of hunting and fishing by non-Indians—were at issue in *Montana*. The Court's holding that the tribe may not regulate such uses by non-Indians on fee lands precludes the similar claim in this case based on no more than inherent authority.[12] *See also United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) (State, not tribe, has authority to regulate use of excess waters by non-Indians on fee land).

The standard enunciated by the Court in *Montana* envisions a close, careful scrutiny of the facts and the justification for the exercise of tribal authority in each case. It requires a precise evaluation of the extent to which non-Indian conduct on the reservation "threatens" or "imperils" the tribe. Because the Ninth Circuit misperceived the *Montana* standard as supporting tribal zoning authority as a matter of law, it disregarded altogether the findings of the district court with regard to

[12] The *Montana* Court suggested that if the State had "abdicated or abused its responsibility for protecting and managing wildlife," tribal regulation of hunting and fishing might be permitted. 450 U.S. at 566 n.16. That was not, however, true in *Montana*, nor is it true here. The record contains no suggestion that Yakima County has abused its zoning power. To the contrary, the district court found the County's zoning plan is *more* protective than the Yakima Nation's of the open area's agricultural lands. Pet. App. 53a.

the open area.[13] The district court specifically found that the proposed development in the open area does not threaten any food source for members of the Yakima Nation; that it will not significantly infringe upon religious or spiritual values of the Yakima Nation; that it does not threaten the unique role that land and natural resources play in tribal life; and that it does not diminish the Yakima Nation's political integrity. Pet. App. 53a-54a.

The very nature of the open area defeats any argument that County zoning would imperil or threaten the Yakima Nation. Almost half of the open area's 350,000 acres are owned in fee (Pet. App. 83a); and of the 25,000 residents, only 5,000 are tribal members. *Id.* at 84a. There are three incorporated towns (*id.* at 51a) and a variety of land uses, including rangeland, agriculture, and commercial and residential development. *Id.* at 40a. Although the record reflects that ninety percent of the Yakima Nation's income derives from the closed area (*id.* at 136a), there is no indication of any income derived from the open area.

The absence of any uniquely tribal qualities in the open area is highlighted by that area's reliance on county government. Yakima County provides extensive services, including a county-maintained road system and schools.

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[13] The flaw in the Ninth Circuit's analysis is obvious. From the *Montana* Court's use of the phrase "health or welfare of the tribe" (450 U.S. at 566), the Ninth Circuit derived the conclusion that the inherent authority of Indians over non-Indians extends to the exercise of traditional police powers: "Zoning, in particular, traditionally has been considered an appropriate exercise of the police power of a local government, precisely because it is designed to promote the health and welfare of its citizens." Pet. App. 21a-22a. Tnat the *Montana* Court never equated inherent tribal power with police power is evident in both the outcome and the language of the case.

It has exercised zoning jurisdiction since 1965 and has long been involved in other planning, development, and regulation of the area. Pet. App. 52a, 88a, 43a.[14]

In sum, the broad view taken by the Ninth Circuit of the inherent sovereignty of the Yakima Nation is unsupported by *Montana*, and it ignores the critical facts found by the district court concerning the virtually non-existent impact on the Yakima Nation of the County's regulation in the open area.

B. Due Process Concerns Require A Narrow Construction Of Tribal Authority Over Non-Indians.

The exercise of tribal jurisdiction over non-Indians on fee land raises serious due process concerns that require a narrow interpretation of Indian jurisdiction. Similar due process concerns were in the background of the Court's analysis in *Oliphant*, which denied the tribe criminal jurisdiction over non-Indians. 435 U.S. at 210. By limiting the reach of tribal authority, the Court was able to avoid addressing the due process questions that an interpretation authorizing Indian criminal jurisdiction over non-Indians would squarely have presented. A similarly narrow interpretation is required here.

The concerns about due process in this case revolve around the fundamental right to vote. Non-Indians have no voice in tribal governance. But it is elementary that those who govern must be politically accountable to those whom they govern. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which . . . we must live. Other rights, even the most basic, are illusory if the right

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[14] On these facts, the Yakima Nation might well have "accommodated itself" to the County's zoning authority. *See Montana*, 450 U.S. at 566. Indeed, the Yakima Nation itself has sought County approval of a long plat. Tr. 455.

to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Beginning with *Wesberry*, the Court has established the principle that citizens have the right to elect on an equal basis with all other citizens those who represent them. 376 U.S. at 17 (election of Members of the House of Representatives). *See Reynolds v. Sims*, 377 U.S. 533 (1964) (election of state representatives); *Avery v. Midland County*, 390 U.S. 474 (1968) (election of local government officials); *Hadley v. Junior College District*, 397 U.S. 50 (1970) (election of junior college district trustees).

Even more fundamental than the right to an equal vote is the right to vote itself. In *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969), the Court held that participation in school district elections could not be conditioned upon owning or leasing taxable real property. "Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives." *Id.* at 626-27. *See Cipriano v. City of Houma*, 395 U.S. 701 (1969) (invalidating law limiting to property taxpayers the right to vote in elections called to approve the issuance of utility bonds); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (invalidating restriction of the franchise to real property taxpayers); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating requirement of one-year residence in State and three-month residence in County as a condition of voting). In short, voting "is regarded as a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

The denial of the right to vote on racial grounds is invidious discrimination explicitly forbidden by the Constitution. U.S. Const. Amend. XV, § 1; *City of Mobile v.*

Bolden, 446 U.S. 55 (1980). No law or scheme of federal, state, or local government with this intent or, at times, this effect would be tolerated. Yet the Ninth Circuit's rule authorizes such a scheme for tribal governments. Nonmembers of the tribe are barred from becoming members—and thus are barred from voting in tribal elections—solely on account of their race.[15] In Yakima County alone, 20,000 non-Indians would be left without a voice in the government—the Yakima Nation—that would most palpably and immediately touch their day-to-day concerns by defining the permissible uses of their property.

This case is readily distinguished from other contexts in which non-resident citizens who own property in a jurisdiction are not entitled to vote there. It works no deprivation of rights to enforce reasonable, nondiscriminatory residence requirements. The obstacle in this case results not from a routine administrative requirement or personal choice, but rather a unique and immutable exclusion based on race. We do not, of course, suggest that the remedy is to compel the tribe to admit nonmembers to membership or to allow them to vote. It is, rather, to adopt a narrow construction of tribal authority over non-Indians that will not raise these most serious questions. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490,

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[15] The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341, does not afford the right to participate in Indian elections to non-Indians who reside within the boundaries of a reservation. Accordingly, that Act does not protect the fundamental right to vote. *Cf. United States v. Mazurie*, 419 U.S. 544, 558 & n.12 (1975). Moreover, because tribal forums enjoy exclusive jurisdiction over civil actions brought to enforce the Act, the Act is, with the exception of habeas corpus, unenforceable in federal court. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Judicial review of tribal government action is effectively prevented. *See id.* at 80 (White, J., dissenting).

499-501 (1979)[16]; *see also Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

These prudential considerations are particularly apt in this case because the most exacting scrutiny is required for racial classifications or deprivations of fundamental rights. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967); *see also United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (Stone, J., concurring). The constitutional defects are avoided, however, by an interpretation that the tribe lacks zoning authority over non-Indians residing on fee lands in the open area of the Reservation.

II. THE NINTH CIRCUIT'S JURISDICTIONAL SCHEME IS UNWORKABLE.

In remanding *Whiteside II*, the Ninth Circuit implied that the interests of the Yakima Nation might outweigh the County's and thus preclude county zoning authority over the open area of the Reservation. Recognizing the importance to governments of the power to impose zoning restrictions to protect the public health and welfare, and to implement the goals of zoning through comprehensive planning, the court held that the Yakima Nation's tribal interests were sufficiently weighty under *Montana* to allow it to zone non-Indian fee land. Pet. App. 20a. The court found, as to the open area of the Reservation, that it could not balance the tribal and county interests on the record before it, and so remanded the case to the district court.

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[16] *See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 108 S.Ct. 1392, 1397 (1988):

> This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

As we argue in Part I, the court's reading of *Montana* was in error. The court committed further error in failing to appreciate that the reasons it gave for finding tribal authority—the importance of zoning and in particular comprehensive zoning—are not unique to the Yakima Nation. While recognizing the tribal interest in regulating to protect the public health and welfare, the court turned a blind eye to the County's interests.

The Ninth Circuit's suggestion that the County's authority to zone the open area depends on a balancing test (and, therefore, that the County's authority might be lacking as to some or all of the roughly 175,000 acres that are individually owned) would create a jurisdictional framework that is, from a practical standpoint, wholly unworkable. These cases would likely not have arisen but for differences between the County's and the Yakima Nation's zoning schemes. Except in the rare case of a jurisdictional dispute as a matter of principle, a struggle over jurisdiction will ordinarily result from divergent policies. Where the policies of separate governments clash, as they do in this case, one government will win and one will lose. Concurrent jurisdiction does not work where comprehensive jurisdiction is required. Nor does a case-by-case adjudication without any definite rules suffice where certainty is required. It is no answer to say that the County's and the tribe's interests must be "balanced."

More than 60 years ago, in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court recognized the power of local governments to use land use regulation "in order to meet effectively the increasing encroachments of urbanization upon the quality of life of their citizens." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 73 (1976) (Powell, J., concurring). Land use regulation may legitimately attempt to produce a living environment that is "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker*, 348 U.S. 26, 33 (1954).

See also Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Zoning is now regarded as "perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.'" *Young*, 427 U.S. at 80 (Powell, J., concurring) (citation omitted). This Court's docket itself bears witness to the particular importance of zoning to local governments.[17]

The primacy of state and local governments in land use regulation has been repeatedly recognized under federal law. Some of the earliest federal land use and environmental regulations reflect the traditional role of local control.[18] Even modern federal legislation, which of necessity has been pervasive and detailed, preserves significant state and local government authority. A number of statutes expressly preserve the full range of local police powers.[19] Some require coordination and consultation with state officials[20]; others mandate a federal-state

[17] *E.g.*, *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

[18] *E.g.*, the Mining Act of 1872, 30 U.S.C. §§ 22 *et seq.*, at §§ 22, 26, 28, 43; the Organic Administration Act of 1897, 16 U.S.C. §§ 473-482, at § 480.

[19] *E.g.*, the Mineral Leasing Act Revision of 1960, 30 U.S.C. §§ 181 *et seq.*, at § 189; the Taylor Grazing Act, 43 U.S.C. § 315, at § 315n; the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1784, at § 1712.

[20] *E.g.*, FLPMA, 43 U.S.C. §§ 1720, 1752(d); the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C.

partnership in achieving identified regulatory goals and allow States to carry out the substantive aspects[21]; still others allow the State to develop its own regulatory plan and require compliance even by federal activities once the plan has been approved.[22]

This Court has repeatedly recognized that, in the absence of specific preemption, state and local governments may apply their laws and regulations even to federally owned lands and activities conducted on them. *See, e.g., California Coastal Comm'n v. Granite Rock Co.*, 107 S.Ct. 1419 (1987); *Kleppe v. New Mexico*, 426 U.S. 529, 543-44 (1976); *McKelvey v. United States*, 260 U.S. 353, 359 (1922). There is no reason to impose greater restrictions on local authority as applied to lands within Indian reservations.

In fact, to a great extent, the use of the fee lands at issue in this case is unquestionably subject to state or local, and not tribal, jurisdiction. Hunting, fishing, and water rights are among the most important associated with land, and they are particularly significant in the Indian culture. See, *e.g.*, Pet. App. 116a, 131a. Nevertheless, as the Court held in *Montana*, state hunting and

§§ 5901-5920, at § 5919(e); the Federal Coal Leasing Amendments Act of 1975, 30 U.S.C. §§ 201-209, at § 201(a)(2)(B); the Deepwater Port Act of 1974, 33 U.S.C. §§ 1501-1524, at § 1508(b); the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1336, at § 1331(a), (d).

[21] *E.g.*, the Clean Air Act, 42 U.S.C. §§ 7401-7642; 1972 and 1977 Amendments to the Clean Water Act, 33 U.S.C. §§ 1251-1376; the Safe Drinking Water Act, 42 U.S.C. § 300(f)-(j); the Comprehensive Environmental Response, Compensation, and Liability Act ("Superfund"), 42 U.S.C. §§ 9601-9657; the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328; the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6987.

[22] *E.g.*, the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464. The only exception to federal compliance under the Coastal Zone Act is in cases of national security. 16 U.S.C. § 1456(c); 1456(d).

fishing laws are not, as a general rule, preempted by tribal sovereign authority with respect to the activities of non-Indians on lands owned in fee. 450 U.S. at 563-566. Similarly, the Ninth Circuit has held that the State, and not the tribe, has authority to regulate the use of excess waters by non-Indians on fee lands. *United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984).

To give the Yakima Nation zoning authority over the lands in question here would create an unmanageable jurisdictional patchwork. Effective zoning regulation requires comprehensive planning authority. Comprehensive planning allows a county to accommodate the competing interests of all its citizens. As the court of appeals itself recognized, "a major goal of zoning is the 'systematic and coordinated utilization of land' in a particular area." Pet. App. 23a, *quoting* N. Williams, *American Land Planning Law* § 1.06 (1974); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983). Dividing zoning jurisdiction between the County and the Yakima Nation would subvert the County's authority not only by countermanding the County's decisions about permitted and prohibited uses, but also by interfering with the County's comprehensive plan.

Here, for example, Yakima County's general rural district "is intended to 'provide protection for the county's unique resources and land base;' 'minimize scattered rural developments . . . by encouraging clustered development;' and 'permit only those uses which are compatible with [the] rural character.'" Pet. App. 45a; see also *id.* at 52a. If the Yakima Nation's restrictions are applied to preclude the proposed development in the place where the County has determined that it would best be located, such development may have to be located elsewhere, where it might not suit the County's comprehensive plan.[23] By

[23] On the facts of this case, the uses allowed by tribal regulation in the closed area are so limited that we do not believe that the County's interests would be seriously threatened even if it did not exercise authority there.

way of further illustration, the district court found that the Yakima Nation's small minimum lot size requirements rendered its zoning scheme less protective than the County's in the open area's agricultural lands. Pet. App. 53a. If it had zoning authority, the Yakima Nation might permit a use that would be contrary to the County's comprehensive plan. Such a use might also have spillover effects that do not observe the boundaries of the Reservation. Regulation by the Yakima Nation thus could thwart the County's policies even with respect to lands off the Reservation.

The decision of the Ninth Circuit, therefore, is not only contrary to federal law and policy, as interpreted by this Court, but would also create a system of jurisdictional conflicts that would undermine the established purposes of land use regulation.

CONCLUSION

The judgment of the court of appeals should be reversed, and the judgment of the district court reinstated, in *Whiteside II*.

Respectfully submitted,

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September 2, 1988